

Testimony of
Mr. Avi Z. Naider
President and Chief Executive Officer, WhenU.com, Inc.

Introduction

Good afternoon, Mr. Chairman and members of the Subcommittee. I thank you for the opportunity to appear before your Subcommittee as it examines the issues surrounding “spyware.” I am Avi Naider, President and Chief Executive Officer of WhenU.com, Inc. (“WhenU”).

WhenU and the Evolution of Contextual Marketing on the Internet

WhenU is an online contextual marketing company. Our software delivers information about products and services to consumers online at the moment that information is most relevant to them. WhenU addresses an age-old problem: consumers’ lack of access to potentially valuable market information when they need it most. Although consumers are inundated on a daily basis with information of all sorts, including offers from advertisers, the value of such information is reduced because it is not shown to the consumer at the right moment in time. WhenU’s software delivers highly pertinent coupons and advertisements based on consumers’ immediate interests, as reflected in their immediate Internet browsing activity, yet is highly protective of consumer privacy.

Contextual marketing technology as developed by WhenU evolved naturally from the decades old, multi-billion dollar database marketing industry, which at its core, relies on behavioral targeting of consumers. Database marketing has been used for years by numerous companies to analyze individual consumers’ past purchasing behavior in an attempt to determine what discounts and offers would be most attractive to those consumers in the future. For example, American Express tracks and analyzes the purchasing behavior of its credit card holders and uses the information gleaned from such analysis to mail potentially pertinent offers to such consumers.

More recently, companies have advanced the field of behavioral marketing by deploying new technology-driven solutions. For instance, Catalina Marketing has developed technology that links to the point-of-sale (POS) systems of many grocery stores and analyzes the purchases of individual consumers as they are scanned by the cashier. Based on the particular products purchased by the consumer, targeted offers and incentives for competing products are then immediately printed for the consumer (typically on the back of his or her grocery store receipt).

Software-based contextual marketing technology as developed by WhenU is a further evolution in the field of behavioral marketing. Whereas traditional database marketing companies, and even innovators such as Catalina Marketing, analyze a consumer’s past and current purchases to predict what the consumer will purchase in the future, software-based online marketing technology assesses the activity of the consumer in real time, at the very moment the consumer is researching a certain product or category

of products on the Internet. Essentially, WhenU's technology utilizes the unique capabilities of the Internet environment to offer the consumer information that might assist him or her in making a purchase decision before the decision is made, at a time when the information is most useful. Imagine that while you are looking in a store window at a new DVD player, someone approaches you with an offer to get a DVD player at a better price at a store down the street. WhenU's technology allows the same thing to happen millions of times per day by providing consumers with offers to purchase all types of goods and services on the Internet.

The Internet by its very nature enables real-time contextual marketing in a robust and scalable manner. Since the Internet is a medium in which all activity is transmitted electronically, WhenU software can scan the Internet browsing activities of a participating consumer to determine his or her immediate interests, and connect thousands of advertisers and millions of participating consumers with the right advertisement or coupon when it is most relevant to the consumer. WhenU's software effectively provides consumers with comparative advertising that presents them with a choice. The idea behind the WhenU software was to revolutionize targeted marketing from the old model in which interests are deduced based on who a consumer is and what their personal information is, to a new software-based system that focuses on actual interests as reflected in their Internet browsing activity – when you shop, when you travel, when you invest. In fact, that's why we named the company WhenU. “When you” are about to book a trip to London, WhenU software will deliver a relevant offer to you.

Best of all, WhenU is able to deliver precisely targeted advertisements that are highly relevant while at the same time protecting consumer privacy. From the beginning, consumer privacy has been important to WhenU. WhenU does not collect any personally-identifiable information. The WhenU software does not track user data, does not use cookies to track consumers, does not track users' clickstream data, does not create anonymous user profiles, and does not compile a centralized database of users. All of the activity takes place on the user's computer (or “desktop”). The only information that is transmitted back to WhenU is information that allows us to show advertisements and coupons to the consumer and make sure the offers we do show are shown at the moment that they are likely to be most useful to the consumer. We are proud of our privacy policy and explain it in detail on our website.

WhenU's software represents a significant departure from the way advertising online initially started. In general, early methods of online advertising were not able to deliver on the promise of the Internet as a rich, personalized consumer contact point. Poorly targeted e-mails, banner ads, and non-contextual pop-ups have yielded click-through rates of less than one percent (1%), and millions of wasted advertiser dollars. To leverage the full power of the Internet and continue to develop the Internet into the kind of rich revenue-generating medium it should be, advertisers have begun to understand that successful online advertising must take advantage of the Internet's unique potential to deliver targeted and relevant advertising in response to what consumers are looking for.

As an example, paid online search, a model promoted currently by companies such as Yahoo! and Google, represented as little as 3% of the online advertising market in the year 2000, but this year is expected to reach 37% as advertisers recognize the power of delivering relevant ads to consumers seeking specific products. WhenU believes that software-based advertising will similarly emerge as an engine of major growth for the Internet in the future, as advertisers and consumers continue to experience the power and richness of software as a medium for delivering highly targeted and useful information and advertising online.

WhenU's Desktop Advertising Network

The WhenU Desktop Advertising Network represents millions of consumers who have installed the WhenU software on their computers. Typically, consumers download the software as part of a package, or "bundle," of software that enables consumers to get popular software for free. Software companies routinely bundle revenue-generating, advertising software (known as "adware") with free software programs (known as "freeware") to enable them to offer the freeware to consumers at no cost. In some instances, software developers might give consumers the choice between paying for the software or agreeing to receive ads from WhenU in exchange for getting the software for free. Developers of such free software applications rely on the revenue generated by software companies like WhenU to enable them to continue to offer their software free of charge. In any event, consumers are given a clear notice and choice whether or not to download WhenU software.

Once downloaded, the WhenU software (called SaveNow, or Save!, but referred to generally as SaveNow) resides on the consumer's computer and generates advertisements through the use of a proprietary directory that is delivered to and saved on the consumers' desktop when the consumer installs the software. This proprietary directory is compiled and updated by categorizing the Internet in much the same way as a local Yellow Pages indexes merchants into various categories.

As a participating consumer "surfs" the Internet, the SaveNow software studies page content, keywords, web addresses, and search terms from the consumer's web browser to determine whether any of those terms, web addresses and/or content match the information in the directory. If the software finds a match, it identifies the associated product or service category and determines whether an appropriate advertisement for that category is available to be displayed, subject to timing and frequency restrictions contained in the software.

With the WhenU software, it is ultimately the consumer who drives whether a particular element will be included in the WhenU directory, because the directory is intended to contain terms that reflect the interests of the consuming public. Similarly, it is the user's actions on his or her desktop that ultimately determine whether an advertisement is eligible to be seen. Since its founding in February 2000, WhenU has delivered online marketing for more than four hundred advertisers, including such well-known companies as Priceline, British Airways, Delta Airlines, JPMorgan Chase, Kraft, Cingular, Ford, and ING Bank.

In short, WhenU provides a useful and privacy-protective opt-in service to participating consumers, provides a revenue model for popular free software, and contributes to the development of the Internet-enabled desktop as a comparative shopping medium.

What is Spyware?

“Spyware” generally refers to software that appears harmless but, once downloaded, operates differently than its stated functionality, such as by stealing or transmitting personal data about the consumer and his or her browsing habits, keystroke data, or clickstream behavior. Spyware also can refer to software that sneaks onto user’s computers, masks its operations once it has been installed on the computer, and is nearly impossible to uninstall. Sometimes programs that are surreptitiously downloaded onto user’s computers and show ads whose source is not easily identifiable are referred to as spyware.

WhenU has sometimes been accused of being “spyware.” It is not surprising that some people who do not understand the WhenU technology think that it is invasive to privacy – how else, they wonder, can it alert a consumer to a discount hotel site when that consumer is looking at hotel rates in Washington, D.C.? However, properly understood, WhenU’s unique proprietary technology cannot be considered spyware. WhenU’s software-based advertising model respects the principles of consumer choice and consumer privacy, in three distinct ways.

First, regardless of the method of distribution, during the installation process, the consumer always receives a prior notice that SaveNow is part of the download. To proceed with the installation of SaveNow, the consumer must affirmatively accept a clear and concise license agreement. The license agreement explains that the software generates contextually relevant advertisements and coupons, utilizing “pop-up” and various other formats.

Second, once a user has installed the SaveNow software, it is easy for a user to identify what the WhenU software does. WhenU makes the ads, offers and coupons served by WhenU easy to identify. Ads on the WhenU Desktop Advertising Network are displayed in a separate, WhenU-branded window, including the marks “Save!” or “SaveNow”, depending on the particular download partner, and other elements specially included in the WhenU window. In addition to WhenU’s unique branding, every WhenU offer also contains a notice on its face that: “This is a WhenU offer and is not sponsored or displayed by the websites you are visiting.” And, with WhenU’s highly-protective privacy policy, users do not have to be concerned about privacy, since no personal information is transmitted to or collected by WhenU. In fact, WhenU’s strict privacy policy far exceeds current standards in the Internet advertising industry.

Finally, after accepting a license agreement and downloading the software, consumers can easily remove or “uninstall” the software from their computers if they no longer wish to keep it. Every ad shown by WhenU contains links to further information about the software and information about how to uninstall it. In addition, these links also

allow consumers to easily contact WhenU by email for more information. The software can be easily uninstalled through the computer's Control Panel Add/Remove Programs menu, the standard process used for uninstalling most Windows-based software. Once properly uninstalled, the WhenU software will cease to operate or show advertisements or coupons on the consumer's computer.

The Threat of Spyware and the Solutions to Spyware

Spyware is a serious problem affecting millions of computer users every day. If the spyware problem continues to grow, unabated, it may deter computer users from the Internet and slow the creation and dissemination of new and innovative software programs available to users from the Internet.

As discussed above, WhenU is very different from "spyware." But notwithstanding these significant differences, WhenU is often swept in with software that threatens user security and privacy. That is why we believe that it is necessary and desirable for Congress and the FTC to regulate this area in order to protect consumers from spyware and protect the development of the Internet as a rich and promising medium.

Current efforts being employed to address consumer concerns are helpful, but they typically fail to get at the real problems presented by spyware. For instance, the marketplace is replete with "anti-spyware" software, but many of these software programs are indiscriminate in their identification of so-called "spyware" and, as a result, often identify benign programs or even files such as cookies, which are commonly employed by Internet websites to identify users who have accessed the site previously. Moreover, most of these programs prompt users to uninstall any software identified as spyware or as a threat. As a result, consumers may be prompted to unknowingly uninstall software that is far from nefarious and that they or another member of their household quite deliberately installed. Users may even have paid for software they are prompted to uninstall, or they may be required to keep such software to support free software that they have also installed. If marketplace solutions unduly burden the revenue model that software providers rely on to continue to offer their software for free, it will discourage the creation and distribution of free software, and force consumers to have to pay for such programs.

At the same time, State legislative solutions are being proposed to respond to the growing menace of spyware, but many of these proposed solutions suffer from the same problems created by "anti-spyware" software: They inadvertently regulate or even restrict consumer-friendly, privacy-protective and mainstream software while failing to protect consumers against software that truly threatens consumer privacy and security. They are also subject to the concerns of local businesses and may not address the problem from a national perspective. As a consequence, these solutions, such as the one recently proposed and passed by the legislature in Utah, are generally ineffective and overly broad.

WhenU is in favor of federal efforts to combat spyware, and fully supports the principles behind the SPYBLOCK Act. As per our practice, WhenU believes that users should receive notice about any application before they download it, should be required to affirmatively accept a clear license agreement that discloses the nature of the application and its functionality, should be presented with information that identifies the source of every window that is generated by software on their desktop, and should be able to uninstall any software application through standard and easily accessible means. WhenU also is in favor of legislation that provides that the Attorney General, States Attorneys General and the FTC should be solely responsible for implementing and enforcing its provisions. However, WhenU first supports careful study and consideration of the problems surrounding spyware. How to combat “spyware” is a complex issue, and we believe the approach lawmakers should take to address the issue should be as nuanced as the problem itself.

Ironically, carelessly worded spyware legislation that lacks nuance will do more to promote the spyware problem than solve it. If legitimate advertising models that truly give choice to consumers are lumped in with nefarious software that intends to deceive, rogue and unscrupulous companies who play by no rules and adhere to no standards of consumer protection will be given the upper hand in the marketplace. And this outcome would be tragic. On the other hand, carefully worded and nuanced legislation can set standards for the online industry and serve as a beacon for the marketplace and for advertisers looking to use legitimate technologies that can reach their target consumers.

We believe that the proceedings today and the FTC Workshop to be held in April will produce a detailed record that will undoubtedly help inform future legislative efforts. We look forward to continuing to work with you, Mr. Chairman, and the members of the Subcommittee, to develop a comprehensive and effective solution to this pervasive problem. Thank you.